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No. 694

IN THE

Supreme Court of the United States

October Term, 1956

SACRAMENTO TELECASTERS, INC., *Petitioner*

v.

McCLATCHY BROADCASTING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Sacramento Telecasters, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on October 18, 1956.

OPINION BELOW

The opinion of the court of appeals (App. 1a) has not yet been reported officially or in the Federal Reporter system, but is reported in 13 Pike & Fischer, Radio Regulation 2072.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1956 (App. 11a). The jurisdiction of this Court is invoked under 47 U.S.C. 402(j) and 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Communications Commission denied on the pleadings a petition, filed under Section 405 of the Communications Act, for reconsideration of an order modifying a construction permit for a television station. The court below reversed the commission on the ground that an evidentiary hearing was required, and that the commission was therefore precluded from acting on the petition for reconsideration as if on motion for summary judgment. The question presented is:

> Whether the Federal Communications Commission is required to order an evidentiary hearing on a petition for reconsideration under Section 405 of the Communications Act where the commission is satisfied on the basis of the facts disclosed by the pleadings that there is no valid basis to vacate or alter its prior decision.

STATUTE INVOLVED

The pertinent sections of the Communications Act of 1934, as amended, 48 Stat. 1064, as amended, 66 Stat. 715, 70 Stat. 3, 47 U.S.C. 1 *et seq.* are as follows:

> Section 309(a). If upon examination of any application provided for in section 308 the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.
>
> * * * * *

Section 309(c). When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission, after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) hereof, but with respect to issues resulting from facts set forth in the pro-

test and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

* * * * *

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, and party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. * * *

STATEMENT

This petition seeks review of a judgment (App. 11a) which reversed an order of the Federal Communications Commission denying a petition for rehearing under Section 405 of the Communications Act, and directed the commission to hold an evidentiary hearing. The action was initiated in the court below by an appeal by respondent pursuant to Section 402(b) of the Communications Act of 1934, 47 U.S.C. 402(b). (R. 4.)

Petitioner and respondent were competing applicants before the Federal Communications Commission for a construction permit for a new television station in Sacramento, California. The commission, after lengthy hearings, rendered a final decision in favor of petitioner. This decision was appealed to the court below (Case No. 12,470) and was ultimately sustained by that court.[1] (App. 10a.)

While the appeal from the decision in the comparative proceeding was pending before the court below, petitioner applied to the commission for modification of its construction permit to specify a different transmitter site and antenna system. This modification application was granted by the commission without hearing pursuant to Section 309(a) of the Communications Act. Thereafter, within the 30 days provided by Section 405 of the Act (*supra,* p. 4), respondent filed an unsworn petition for rehearing, seeking to have peti-

[1] No review is here sought of the judgment sustaining the commission's final decision in the comparative television proceeding (C.A.D.C. No. 12,470) which was consolidated for argument and decision with the instant case (C.A.D.C. No. 12,637). It is understood, however, on the basis of pleadings filed in the court below, that respondent intends to seek review of that decision.

tioner's modification application designated for an evidentiary hearing. Petitioner filed a sworn opposition to this petition, and respondent filed a reply to the opposition. (R. 16, 23, 62, 105.)

The commission, after considering all the pleadings, denied the petition for rehearing on the ground that respondent lacked standing to object to the modification of construction permit since it had not been injured thereby. The commission nevertheless proceeded to consider the merits of the questions raised and found, upon the basis of all the pleadings filed, that there was no sound reason for setting aside the grant of petitioner's modification application. (R. 128.)

The court below reversed the commission's decision. (App. 10a.) It held that respondent, as a former competing applicant, had standing to object to the commission's action granting the modification application.[2] And it held that the commission could not "properly proceed, as it did, to dispose of the matter as though on a demurrer which searched all the pleadings or, perhaps more accurately, as though on a motion for summary judgment under Rule 56 of the Federal Rules." (App. 9a.)

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with the Communications Act and with applicable decisions of this Court.

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[2] Petitioner believes that holding to be erroneous, but since it involves a somewhat unique factual situation, it is not believed to involve a matter of sufficient general importance to warrant review by this Court.

A petition for rehearing under Section 405 is addressed to the sound discretion of the commission.[3] It is not required to grant such a petition; the statute is worded in permissive terms: "* * * it shall be *lawful* for the Commission, *in its discretion,* to grant such a rehearing if sufficient reason therefor is made to appear" (emphasis added). The court below did not hold that, on the particular facts presented, the commission had abused its discretion. Instead, it relied upon cases[4] interpreting and applying a provision (now obsolete) of a different section of the Communications Act—Section 309(c)—as holding that an evidentiary hearing is mandatory. The court apparently failed to perceive the basic difference between the provisions for *mandatory* hearing formerly contained in Section 309(c) and the *discretionary* hearing provision found in Section 405.

Section 309(c) provides for protests against grants of applications by the commission without hearing. The protest must be under oath, and it must state with specificity the grounds upon which it is urged that the grant should be set aside. Section 309(c) was introduced into the Communications Act by the Communications Act Amendments, 1952, 66 Stat. 715. As originally enacted, the protest provision prescribed a mandatory hearing on any protest found by the commission to be technically sufficient. The section provided:

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[3] Indeed, respondent expressly conceded this principle in its brief in the court below (Appellant's Br. 27-28).

[4] *Federal Broadcasting System* v. *Federal Communications Commission,* 96 U. S. App. D. C. 260, 225 F. 2d 560; *Federal Broadcasting System* v. *Federal Communications Commission,* 97 U. S. App. D. C. 293, 231 F. 2d 246.

> The Commission shall, within fifteen days from the date of the filing of such protest, enter findings as to whether such protest meets the foregoing requirements and if it so finds the application involved *shall be set for hearing* upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission. [Emphasis added.]

The decisions of the court of appeals interpreting this section properly held that the commission was not vested with discretion to refuse a full evidentiary hearing on a valid protest.[5] In 1956, however, as the court below recognized (App. 10a), Section 309(c) was amended to give the commission discretion in certain circumstances to dispose of protests without evidentiary hearings. Public Law 391, 84th Cong., 2d Sess., 70 Stat. 3.

The petition filed by respondent before the commission did not purport to be under Section 309(c) and was not under oath, which is a jurisdictional requirement of the protest provision. There was no claim before the court below that the pleading could legally be treated as a Section 309(c) protest. The court below explicitly noted that this proceeding arose under Section 405, and its opinion contains two references to that section (App. 4a, 5a). It cannot be assumed, therefore, that the court thought that this case involved a Section 309(c) protest.

The holding of the court below must be interpreted as a deliberate application of the mandatory hearing standard embodied in the protest provision (until modified by Congress in 1956) to a petition for rehear-

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[5] *Supra*, note 4.

ing under Section 405, which explicitly vests the commission with discretion.

It is settled law that once an administrative agency has rendered a final decision there is no absolute right to rehearing, absent some special statutory provision therefor, and the agency's exercise of sound discretion in passing on a petition for rehearing will be upheld unless clearly erroneous. Administrative proceedings must come to an end at some point. *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 534-535; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 514-515. The decision below cannot be reconciled with these decisions.

2. This case is of importance not only to the administration of the Communications Act, but to the field of administrative law generally.

Congress has wisely afforded significant procedural rights to parties before administrative agencies, and the courts are properly assiduous in safeguarding those rights. They should be equally assiduous, however, in being careful not to engraft on the administrative process mandatory procedures contrary to the statutory scheme and not required by the Constitution.

This Court has been careful to limit judicial encroachment on administrative discretion with respect to hearings and rehearings. *United States* v. *Pierce Auto Freight Lines,* 327 U. S. 515, 534-535; *Interstate Commerce Commission* v. *Jersey City,* 322 U. S. 503, 514-515; *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.,* 337 U. S. 265; *United States* v. *Storer Broadcasting Company,* 351 U. S. 192. Unfortunately, the decision below reflects just such an encroachment.

In the instant case respondent's petition for rehearing (which was not sworn) contained allegations of fraud (App. 4a) which were based upon surmise and conjecture. These allegations were refuted in petitioner's sworn opposition to the petition. The commission, after consideration of all the pleadings, properly found that the fraud charges had not been established (R. 128-138). The court below did not overturn that finding. It ruled, as a matter of law, that the commission may not treat pleadings on a petition for rehearing as though on a motion for summary judgment (App. 9a). Thus the court has in effect read out of Section 405 the discretion explicitly vested in the commission as to the granting of rehearings.

In the instant case the court's erroneous interpretation of law, unless reversed by this Court, would result in a serious additional burden on the Federal Communications Commission, since it would require evidentiary hearings in a host of cases which lawfully could be disposed of without hearing if the commission, in its sound discretion, should so decide. And the policy, implicit in the decision below, of judicially requiring evidentiary hearings in situations where there is no statutory requirement therefor would be equally applicable in fields of administration involving other statutes and other agencies. Hence, it is important to the sound development of administrative law that the decision below be reversed.

CONCLUSION

The decision below is in conflict with Section 405 of the Communications Act and with decisions of this Court. It sets a dangerous precedent which, unless reversed, will result in the imposition of material and unnecessary new burdens on administrative processes.

Respectfully submitted,

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